No. 10108

In the United States Circuit Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

MONTGOMERY WARD & CO., RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

ROBERT B. WATTS,
General Counsel,
ERNEST A. GROSS,
Associate General Counsel,
GERHARD P. VAN ARKEL,
Assistant General Counsel,
MORRIS P. GLUSHIEN,
OWSLEY VOSE,
JOHN H. GARVER,
Attorneys,
National Labor Relations Board.

FILED
JUL 7 - 1942
PAUL P. O'BRIEN,
CLERK

INDEX

	Page
Jurisdiction	1
Statement of the Case	2
Respondent's business	2
The unfair labor practices	3
The Board's order	3
Summary of Argument	4
Argument	4
I. The Board's findings of fact are supported by substantial evidence. Upon the facts so found, respondent has engaged and is engaging in unfair labor practices within the meaning of Section 8 (1) and (5) of the Act	4
A. The September 19 and October 22 conference with the Retail Clerks	5
B. The November 12 conference with the Warehousemen	8
C. The November 25 joint conference with the Retail Clerks and the Warehousemen	12
D. The strike and respondent's efforts to induce the employees to abandon the Unions and return to work	14
E. The December 13, 14, and 16 joint conferences with the Retail Clerks and the Warehousemen	17
F. The respects in which respondent refused to bargain collectively in violation of Section 8 (5) and (1) of the Act	23
1. Respondent's refusal to assure the Unions that it would reduce to writing whatever understandings were reached	25
2. Respondent's refusal to agree to concededly reasonable proposals	26
3. Respondent's insistence upon determining unilaterally matters which were the legitimate subjects of collective bargaining	29
4. Respondent's steadfast refusal to make any affirmative efforts to reach an accord with the Unions	30
5. Respondent's efforts to induce the employees individually to abandon the strike and to return to work	33
G. Respondent's interference, restraint, and coercion in violation of Section 8 (1) of the Act	39
II. The Board's order is valid and proper under the Act	39
Conclusion	41
Appendix	42

469163—42——1

AUTHORITIES CITED

Page

Globe Cotton Mills v. *National Labor Relations Board*, 103 F. (2d) 91 (C. C. A. 5) 24, 32

Hartsell Mills Co. v. *National Labor Relations Board*, 111 F. (2d) 291 (C. C. A. 4) 26

H. J. Heinz Co. v. *National Labor Relations Board*, 311 U. S. 514, aff'g 110 F. (2d) 843 (C. C. A. 6) 6, 17, 23, 25, 26, 31

International Ass'n of Machinists v. *National Labor Relations Board*, 311 U. S. 72 17

McQuay-Norris Mfg. Co. v. *National Labor Relations Board*, 116 F. (2d) 748 (C. C. A. 7), cert. den. 313 U. S. 565 26

Montgomery Ward & Co., Inc., v. *National Labor Relations Board*, 107 F. (2d) 555 (C. C. A. 7) 3, 6

Montgomery Ward & Co., Inc., v. *National Labor Relations Board*, 115 F. (2d) 700 (C. C. A. 8) 3

National Labor Relations Board v. *Biles-Coleman Lumber Co.*, 98 F. (2d) 18 (C. C. A. 9) 24, 34, 39, 41

National Labor Relations Board v. *Boss Mfg. Co.*, 118 F. (2d) 187 (C. C. A. 7) 28, 32

National Labor Relations Board v. *Bradford Dyeing Ass'n*, 310 U. S. 318 41

National Labor Relations Board v. *Carlisle Lumber Co.*, 94 F. (2d) 138 (C. C. A. 9), cert. denied 304 U. S. 575 41

National Labor Relations Board v. *Express Publishing Co.*, 312 U. S. 426 33, 40

National Labor Relations Board v. *Griswold Mfg. Co.*, 106 F. (2d) 713 (C. C. A. 3) 24, 33

National Labor Relations Board v. *Grower-Shipper Vegetable Ass'n*, 122 F. (2d) 368 (C. C. A. 9) 40

National Labor Relations Board v. *Highland Park Mfg. Co.*, 110 F. (2d) 632 (C. C. A. 4) 24, 26, 28

National Labor Relations Board v. *Hollywood-Maxwell Co.*, 126 F. (2d) 815 (C. C. A. 9) 40

National Labor Relations Board v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1 2

National Labor Relations Board v. *Link-Belt Co.*, 311 U. S. 584 17

National Labor Relations Board v. *P. Lorillard Co.*, 314 U. S. 512 41

National Labor Relations Board v. *National Motor Bearing Co.*, 105 F. (2d) 652 (C. C. A. 9) 40

National Labor Relations Board v. *Pacific Gas & Electric Co.*, 118 F. (2d) 780 (C. C. A. 9) 17, 40

National Labor Relations Board v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261 39

National Labor Relations Board v. *George P. Pilling & Son Co.*, 119 F. (2d) 32 (C. C. A. 3) 24, 32

National Labor Relations Board v. *Reed & Prince Mfg. Co.*, 118 F. (2d) 874 (C. C. A. 1), cert. denied 313 U. S. 595 24, 30, 34

National Labor Relations Board v. *Remington Rand, Inc.*, 94 F. (2d) 862 (C. C. A. 2), cert. denied 304 U. S. 576 34

Page

National Labor Relations Board v. *Suburban Lumber Co.*, 121 F. (2d) 829 (C. C. A. 3), cert. denied 314 U. S. 693 ---- 3

National Labor Relations Board v. *Sunshine Mining Co.*, 110 F. (2d) 780 (C. C. A. 9), cert. denied 312 U. S. 678 ---- 24

National Labor Relations Board v. *Virginia Electric & Power Co.*, 115 F. (2d) 414 (C. C. A. 4) ---- 3

National Labor Relations Board v. *Westinghouse Airbrake Co.*, 120 F. (2d) 1004 (C. C. A. 3) ---- 30

National Licorice Co. v. *National Labor Relations Board*, 309 U. S. 350 ---- 30

Rapid Roller Co. v. *National Labor Relations Board*, 126 F. (2d) 452 (C. C. A. 7) ---- 30

Republic Steel Corp. v. *National Labor Relations Board*, 107 F. (2d) 472 (C. C. A. 3), cert. denied 309 U. S. 684 ---- 41

M. H. Ritzwoller Co. v. *National Labor Relations Board*, 114 F. (2d) 432 (C. C. A. 7) ---- 33, 34

Singer Mfg. Co. v. *National Labor Relations Board*, 119 F. (2d) 131 (C. C. A. 7), cert. denied 313 U. S. 595 ---- 24, 28, 30, 37

Stonewall Cotton Mills v. *National Labor Relations Board*, decided June 3, 1942, 10 L. R. R. 514 (C. C. A. 5) ---- 35

Virginian Ry. Co. v. *System Federation No. 40*, 300 U. S. 515 ---- 38

Wilson & Co. v. *National Labor Relations Board*, 115 F. (2d) 759 (C. C. A. 8) ---- 24, 28

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 10108

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

MONTGOMERY WARD & COMPANY, RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board for the enforcement of an order issued by it against respondent pursuant to Section 10 (c) of the National Labor Relations Act (49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*). Respondent is an Illinois corporation operating a mail-order house and retail store in Portland, Oregon, where the unfair labor practices occurred. The jurisdiction of this Court is based upon Section 10 (e) of the Act.

STATEMENT OF THE CASE

Upon proceedings had pursuant to Section 10 of the Act,[1] the Board, on November 29, 1941, issued its findings of fact, conclusions of law, and order (R. 22–85), which may be briefly summarized as follows:

Respondent's business (R. 26).—Respondent is engaged in the sale and distribution of merchandise through 9 mail order houses, 650 retail stores, and 206 mail order sales units, located in various states. Only the Portland mail order house and retail store are here involved. The retail store sales amount to about $3,000,000 annually; the mail order house sales to about $13,000,000 annually. Approximately 90 percent of the goods distributed by the mail order house and the retail store are shipped to Portland from outside the State of Oregon. Less than one percent of the sales of the retail stores are delivered to customers outside the State of Oregon, but approximately 60 percent of the sales of the mail order house are so delivered.[2]

[1] These included charges filed by Warehousemen's Union, Local No. 206, chartered by International Brotherhood of Teamsters, Chauffeurs, Stablemen, and Helpers of America, affiliated with the American Federation of Labor (R. 1–3); charges filed by Retail Clerks' International Protective Association, Local No. 1257, affiliated with the American Federation of Labor (R. 4–6); a consolidated complaint of the Board dated March 31, 1941 (R. 8–14); answer of respondent (R. 16–21); hearing before a Trial Examiner, April 14 to 17, 1941; Intermediate Report of the Trial Examiner; respondent's exceptions thereto and brief; and oral argument before the Board in Washington, D. C., on August 5, 1941.

[2] Upon these facts which were stipulated at the hearing (R. 522–524) the Board's jurisdiction is clear. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, and com-

The unfair labor practices (R. 27–33).—Respondent, in violation of Section 8 (5) and (1) of the Act, refused to bargain collectively in good faith with Warehousemen's Union, Local No. 206 (herein called Warehousemen), and Retail Clerks' International Protective Association, Local No. 1257 (herein called Retail Clerks), said two unions being herein collectively called the Unions; and during a strike caused and prolonged by respondent's refusal to bargain collectively in good faith, respondent, in further violation of Section 8 (1), made coercive statements, and also solicited employees individually to return to work in an effort to induce them to desert the Unions and to abandon their concerted activities.

The Board's order (R. 80–85).—In addition to the usual cease and desist provisions, the Board ordered respondent to bargain collectively with the Unions, to reinstate with back pay such striking employees as respondent had theretofore refused to reinstate, and, upon application, to reinstate or place upon a preferential hiring list the remaining strikers, with back pay from any denial of their application for reinstatement or placement on a preferential list.

panion cases; *Virginia Electric & Power Co.* v. *National Labor Relations Board*, 115 F. (2d) 414, 415–416 (C. C. A. 4), approved in this respect, 314 U. S. 469, 476; *National Labor Relations Board* v. *Suburban Lumber Co.*, 121 F. (2d) 829 (C. C. A. 3), cert. denied, 314 U. S. 693. The applicability of the Act to this very mail order house and retail store was sustained by the Circuit Court of Appeals for the Seventh Circuit in *Montgomery Ward & Co.* v. *National Labor Relations Board*, 107 F. (2d) 555, 558; see also *Montgomery Ward & Co.* v. *National Labor Relations Board*, 115 F. (2d) 700 (C. C. A. 8). Respondent does not question the Board's jurisdiction.

SUMMARY OF ARGUMENT

I. The Board's findings of fact are supported by substantial evidence. Upon the facts so found, respondent has engaged and is engaging in unfair labor practices within the meaning of Section 8 (1) and (5) of the Act.

II. The Board's order is valid and proper under the Act.

ARGUMENT

Point I

The Board's findings of fact are supported by substantial evidence. Upon the facts so found, respondent has engaged and is engaging in unfair labor practices within the meaning of Section 8 (1) and (5) of the Act [3]

The Board, after reviewing a series of negotiations taking place during September, October, November, and December 1940, between respondent and the Unions covering proposed contracts submitted by the Unions, found (R. 68, 80) that respondent "did not, as it was bound to do, 'confer and negotiate sincerely with the representatives of its employees * * * with an open mind and a sincere desire to reach an agreement in a spirit of amity and cooperation,' " that its failure to do so constituted a refusal to bargain in violation of Section 8 (5) and (1) of the Act, and that "a substantial cause" of a strike called by the Unions in December 1940 "and its prolongation was the justified feeling of the Unions that the respondent was 'stalling'; that is, not fulfilling its obligation to bargain

[3] The pertinent sections of the Act are set forth in full in an appendix to this brief, p. 42, *infra.*

collectively as required by the Act."[4] The following resume of the evidence upon which the Board relied shows clearly that the Board's ultimate findings are amply supported.

A. The September 19 and October 22 conferences with the Retail Clerks

The first meeting of respondent with the Unions was with the Retail Clerks on September 19, 1940. At this meeting the discussion centered chiefly about questions of the appropriate unit and whether the Retail Clerks represented a majority (R. 328–329). W. B. Powell, representing respondent,[5] asked that a single contract be negotiated for the entire retail store (R. 331, 508). Fred Dixon, representing the Retail Clerks, explained that his organization had no jurisdiction over office workers, that the Office Employees Union had such jurisdiction, and while maintaining the appropriateness of separate units for each group, indicated a will-

[4] Having previously certified the Warehousemen as the exclusive bargaining representative of certain described employees of the Portland mail order house (R. 119–121), the Board found that Warehousemen was on August 10, 1940, and at all times thereafter, the duly designated representative of a majority of the employees in an appropriate bargaining unit (R. 27–28). The Board further found that the unit sought by Retail Clerks constituted an appropriate unit and that Retail Clerks on August 6, 1940, and at all times thereafter, represented a majority of the employees in said unit (R. 30, 32). Respondent does not question either the appropriateness of the units found by the Board or the Unions' majority status therein.

[5] Powell, respondent's West Coast labor representative, had been instructed by John A. Barr, his superior in the Chicago Office of respondent and in charge of labor relations matters at all of respondent's mail order houses and retail stores, to represent respondent in the negotiations (R. 137, 825).

ingness to arrange for negotiating a contract jointly with the Office Employees Union (R. 331–332; Bd. Exh. 6, R. 323). Before adjourning, Dixon asked Powell whether, if an agreement were reached, respondent was "in a position to sign an agreement"; Powell replied that "they didn't sign any agreements" and that to his knowledge "they had no signed agreements" (R. 335, 449–450, 857, 705).[6]

An arrangement having been worked out whereby the Retail Clerks and the Office Employees Union would negotiate a single contract covering the employ-

[6] The Board found in an earlier decision involving the mail order house and retail store here involved (9 N. L. R. B. 538), which was sustained with minor modifications in *Montgomery Ward & Co.* v. *National Labor Relations Board*, 107 F. (2d) 555 (C. C. A. 7), that respondent had, after attempts were made in November 1936 to organize the employees, issued a statement in which reference was made to "our long-established policy to enter into no business agreement with any outside organization." The statement in full is as follows (9 N. L. R. B., at 542):

"We recognize the rights of our employees to join or refrain from joining any organization as they see fit. We sincerely believe that there is no advantage to you in joining any outside organization, and it represents an unwise expense to you.

"It is our long-established policy to enter into no business agreement with any outside organization in view of our policy of fair dealing and open frank discussions with our own people. It is not believed there is anything whatever to be gained by such a contract, nor is there any legal requirements for it.

"We will not permit any organization whatever to dictate our wage rate, the right of hiring or dismissal, nor any of our personnel policies."

Powell's stand at the September 19 conference makes it clear that respondent's "long-established policy" in 1936 was still in effect in 1940, though it plainly violated the Act. *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514.

ees of the retail store, the parties again met on October 22. Union Representative Dixon opened the conference by asking if respondent was satisfied that they represented a majority of the Retail Clerks. Powell assured them that he was accepting them as representing a majority and the discussion turned to Section 1 of the Retail Clerks' proposed agreement providing for a union shop (R. 338–339). Powell refused to agree to a union shop, asserting that it was contrary to "company policy," that "they weren't going to compel anybody to belong to a union in order to have employment with Montgomery Ward & Company" (R. 339–340). When Powell remained unmoved by a number of arguments which Dixon presented in favor of granting a union shop, Dixon requested Powell to present counterproposals, or as he termed it, a "substitute" provision (R. 339–340, 465). Powell took the request under consideration (R. 346–348). The next day Dixon called Powell on the telephone and renewed his request for a counterproposal (R. 347–348). Powell merely reaffirmed his original stand, declaring that respondent's "counterproposal" would be that "the work of organizing the employees should be done by the union" (Resp. Exh. 24, R. 822). Dixon then inquired if respondent had any counterproposal to offer to the entire contract (*ibid.*). Powell replied that he could "not see why they had to give us a counterproposal, because they weren't asking anything from the union while the union was asking from them [and he] couldn't see any sense in them giving us a counterproposal" (R. 348–349). Throughout the nego-

tiations Powell, in plain violation of the requirements of the Act (*infra,* pp. 30–33), continued to maintain this same negative position; that is, that respondent could sit back and refuse to take any initiative in the negotiations, and hence that it was under no obligation to submit counterproposals.[7]

B. The November 12 conference with the Warehousemen

The first meeting of respondent with the Warehousemen was held on November 12. At this meeting the Warehousemen's proposed contract was discussed paragraph by paragraph. With one possible exception,[8] not a single provision was acceptable

[7] The full sweep of respondent's "do-nothing" policy and the cold calculation with which it was adopted are strikingly revealed in a letter of instructions Barr sent to Powell during the negotiations, in part as follows (Resp. Exh. 18, R. 735):

"1. The purposes of bargaining are best served by oral negotiations. We need not state our position to the union in writing.

"2. The union is seeking something from us. We are not to assume the initiative by volunteering proposals or counterproposals.

"3. In discussing individual clauses, state that you have no present objection to clauses which are not objectionable, but do not 'agree' to such clauses. You can only agree to a contract as a whole.

"4. Insist on a 'no-strike' clause without qualifications or exceptions.

"5. Whenever in doubt as to what you should do, resolve the doubt in favor of the Company. Err on the side of conservatism if you err at all.

"6. Do not rush the bargaining process and do not yourself take the initiative in seeking an agreement."

[8] Union Representative Estabrook testified that he did not think Powell offered any objection to Article 10, providing that respondent should adhere to its past practice regarding vacations (R. 156).

to Powell (R. 146–158). Not even the clause providing for recognition of the Warehousemen (Bd. Exh. 3, R. 128) nor the one prohibiting antiunion discrimination (Bd. Exh. 3, R. 132) was acceptable, Powell taking the stand that as these matters were provided for by law, they were not a proper subject of agreement (R. 155, 282; Resp. Exh. 19, R. 737, 740). When the Union insisted that the recognition clause be included in the contract, Powell suggested that similar language be placed merely in a preliminary "whereas" clause (R. 282; Bd. Exh. 12, R. 556, Resp. Exh. 19, R. 737, cf. Resp. Exh. 10, R. 629).

The Union's proposals for a union shop, a seniority rule, the creation of a "Board of Adjustment" to settle differences by arbitration, were each rejected as being contrary to "company policy" (R. 148, 153, 158, 283; Resp. Exh. 19, R. 740). Powell testified in connection with these proposals that respondent believed that "the ultimate decision in matters affecting the hiring and discharge of employees and matters generally affecting the operation of the business, should remain in the management of the company", that this was necessary "in order to operate this business, the mail-order business and the retail-store business successfully" (R. 829). Powell explained respondent's policy in connection with these proposals, asserting in connection with the union-shop proposal that it was not respondent's policy to force its employees into a union (R. 148). With respect to seniority Powell stated that respondent's policy in determining whom to lay off and rehire was to consider efficiency, ability, adaptability, promot-

ability, flexibility, age, sex, and marital status, as well as seniority (Resp. Exh. 19, R. 740; R. 192)[9] Powell explained his rejection of the Union's proposal for the creation of a Board of Adjustment to settle differences arising under the contract by saying that "the ultimate decision on matters affecting the operation of the business should remain in the Management" (Resp. Exh. 19, R. 742; R. 158, 191).[10] Powell flatly refused to agree to the union proposal for an increase in wages, stating that respondent's policy with respect to wages was to pay as much or more than its competitors for comparative work and that this was being done; this the union disputed. Powell then advised the union representatives of the minimum rates being paid in the various classifications (R. 151–152, 193).

[9] "What a mess of words," was Barr's frank observation concerning respondent's position with respect to seniority (Resp. Exh. 10, R. 631).

[10] The unwilling attitude with which respondent approached the making of a collective agreement, which, to the extent that it imposes binding commitments upon an employer, necessarily impinges upon what would otherwise be the "prerogatives of management," is plainly disclosed in a letter which Barr had previously written Powell concerning a similar demand for an arbitration clause by the Retail Clerks, as follows (Resp. Exh. 8, R. 625):

"Our thinking with regard to arbitration clauses is that they are not acceptable to us. We are not prepared to voluntarily relinquish any of the prerogatives of management in our dealings with the union. It is impossible to agree to any sort of an arbitration set-up without to some extent vesting in an outsider a decision-making prerogative which we feel must be retained within the management."

Powell also refused to agree to the Union's request for a meal period after 5 hours of continuous work, insisting that the period should be 6 hours (R. 154); he did this despite the fact that his superior, Barr, had previously written him "that under normal conditions an employee should not be worked more than five consecutive hours without a meal period" (Resp. Exh. 10, R. 630). Powell rejected the Union's proposal for additional compensation for working supervisors upon the ground that "they didn't employ anybody under these names, and they didn't think it was necessary or any use to argue about something they didn't contemplate doing" (R. 284). The spuriousness of this ground for rejecting the Union's demand is apparent from Powell's report to Barr immediately after the meeting, that "as a matter of fact we do have working supervisors in the Portland plant" (Resp. Exh. 19, R. 739).

The union spokesman then requested respondent to prepare "a written statement of terms which would be agreeable to the Company." Respondent's peculiar concept of collective bargaining is manifest from Powell's reply: he stated that it would serve no useful purpose for respondent to do so unless respondent could be assured that the terms would be agreeable to the Union (Resp. Exh. 19, R. 743)—in other words, that the Company proposals would not be subject to any negotiations, but merely to acceptance on a "take it or leave it" basis. The union representative did not assent to this, and repeated his request for a written counterproposal so that "they would have

something to submit at the meeting of the Union members." Powell flatly refused (*ibid.*).[11]

C. The November 25 joint conference with the Retail Clerks and the Warehousemen

On November 25, a joint conference between representatives of respondent and representatives of both Unions was held at Oakland, California (R. 159). Early in the conference, according to Powell himself, the union representatives asked him, "Will your company sign a contract?" (R. 834). Powell did not assure the Unions of respondent's willingness to do so, as the law requires; instead he hedged, as he had been instructed by Barr to do,[12] by suggesting that it depended upon what the Unions' proposals were (*ibid.*). A discussion of various provisions of the proposed contract ensued, including particularly a dis-

[11] It is interesting to note that Powell had his doubts about the propriety of the position he had taken with respect to the request for counterproposals. Thus in a letter to Barr written on November 13 he expressed himself as follows (Resp. Exh. 19, R. 743–744):

"I would like to submit this for your consideration. Do you feel that our obligation to bargain in good faith requires that we submit the company's position in writing? The question of reasonableness is involved here, and I have not yet reached a conclusion in my own mind. There is some argument to the effect that if we will state verbally the terms which are agreeable to us we should have no objection to reducing those terms to writing * * *."

[12] A day or two earlier Barr had written Powell (Resp. Exh. 18, R. 736):

"Whether or not any agreement reached will be reduced to writing and signed can only be determined after an agreement is reached. Prior to that time a discussion of this point is premature."

cussion of the Unions' demands for a union shop (R. 208–209, 287, 835–836). Powell again declared that a union shop was against "company policy" (R. 286–287, 833–835). The union representatives, pointing out that respondent had repeatedly rejected their proposals upon the grounds of "company policy" (R. 161–162, 164), inquired whether Powell had the authority to change "company policy," so as to facilitate agreement.[13] When Powell answered that he did not (R. 166), the union representatives offered to take an airplane to Chicago to take up their proposals with officials having such authority (R. 162–164, 289). Although the Unions insisted upon receiving a prompt answer to this proposition, Powell put them off, agreeing to give an answer in three days (R. 289). Thereupon the union representatives expressed the view that they "were being stalled" (R. 161–162); that that was indeed the fact is evident from Powell's report to Barr on November 26 of the meeting of November 25 in part as follows (Resp. Exh. 20, R. 746):

> * * * At first they insisted we give them a reply within twenty-four hours, but later agreed to allow us until noon on Thursday, November 28. I will wait until Thursday morning at which time I will call Mr. White in San Francisco and explain that you will be glad to meet with union representatives in Chicago and listen to their argument, but I will not assure

[13] One of the union representatives also inquired whether "company policy" was the same as it was in 1936 or 1937, when respondent discharged a number of men for joining the Union. Powell replied, according to the representative, "not to his knowledge" (R. 287–288). See note 6, p. 6, *supra*.

> him that any change in policy is contemplated, I will state that as far as I know no change is contemplated at the present time.

Thus, as the Board found (R. 48), "it is to be observed that although the respondent had made its decision, as early as November 26, on the Union's suggestion that the negotiations be continued in Chicago, and although the respondent was fully aware of the Union's desire for an early reply, it deliberately delayed its reply to [the Union] until November 28."

D. The strike and respondent's efforts to induce the employees to abandon the Unions and return to work

Although the Unions were advised just before the expiration of the 3-day period agreed upon at the November 25 conference that respondent had not receded from any of the positions taken during the negotiations (R. 841), the Unions did not carry out a threat to strike which they had made at the November 25 conference, but sought to arrange further meetings with respondent (R. 355–357). On December 2, Dixon, representing the Retail Clerks, informed the manager of the Portland retail store that "we were very anxious to try to bring about a settlement"; that they thought "that the company was stalling for time"; and that the Retail Clerks was willing to withhold strike action if respondent would arrange for a meeting with them. The manager replied that he would try to induce Powell to come to Portland (R. 355–357). On December 4, the employees of the Oakland plant went out on strike, and Powell remained in Oakland attempting to settle the strike there (R. 842). After a further in-

quiry from Dixon concerning negotiations on behalf of the Portland employees, Dixon received word from Powell that negotiations were being carried on at Oakland. Dixon objected to bargaining at Oakland but nevertheless offered to permit the negotiations to be carried on at Oakland in behalf of the Portland employees if it were impossible for respondent to send a representative to Portland (R. 445–446). Hearing nothing further, however, from respondent on December 6, the members of the Retail Clerks unanimously voted to go on strike at Portland the next day, primarily because of their sentiment that respondent had refused "to negotiate a contract at Portland" (R. 358). Immediately thereafter the Warehousemen declared a strike at Portland to support the Retail Clerks and because "the membership got tired of Montgomery Ward stalling us around" (R. 258, 213–214). On December 7, picket lines were established outside the mail-order house and the retail store, and the strike began.

On Sunday, December 8, the superintendent of the mail-order house called a meeting of the operating superintendents of each floor, handed them a list of the names and telephone numbers of employees who worked under them, and instructed them to transmit to those employees a message as follows (Resp. Exh. 7, R. 580; R. 566–569):

> "Since you were not at work today I wanted to let you know that we are operating tomorrow as usual and your job is open for you if you want to come in."
>
> (When you have made the above statement, listen for the employee's reaction to it. Do not

> make any further statement unless the employee asks some question. It is not possible to set out all the possible questions which you may be asked, but in answering the questions you should confine yourself to a repetition of the thought contained in the quotation above. When questions are asked, you may answer them frankly, but above all, do not insist that the employee should come to work or intimate that their jobs will be in danger. The main purpose of this call is to notify the employee that the plant is operating and his job is waiting for him if he wants to come in.)

One of the superintendents called in and given these instructions was W. A. McGowan, the operating superintendent of the fifth floor of the mail-order house, who had about 50 employees under his supervision (R. 564–566). McGowan did not limit himself to circulating the quoted message; he not only informed his subordinates that respondent was operating as usual, but he also flatly warned them that if they did not return to work by a certain date, he would replace them with new employees.

Thus he advised one of his subordinates over the telephone "to tell the kids that if they weren't there on Monday morning (December 9) he was going to reinstate them with new employees" (R. 615). McGowan visited Employee Robert Fullerton at the latter's home [14] and stated that "he was just making a friendly call * * * coming around to each and every one that he figured he could trust * * * in order to get them

[14] McGowan had never visited Fullerton's home before (R. 774).

back to work, and to tell them that if they were not there by a certain date, they would have to have their jobs refilled" (R. 776); McGowan further stated that respondent "would never go union, that if it did, they would lock the door" (R. 777). During the strike McGowan also called at Employee William E. Hough's home, but did not find him in. When Hough later looked up McGowan, McGowan suggested that he could come back to work without going through the picket line, that is, by "the back way of the store" and urged him to persuade his fellow workers to "come in the back door" (R. 595; cf. 613–614). McGowan also informed him that "the store would never go union; that they would lock the store and send all the books and everything to the Chicago house before they would sign a union contract" (R. 592; cf. R. 789).[15]

E. The December 13, 14, and 16 joint conferences with the Retail Clerks and the Warehousemen

On December 13, 14, and 16, while the strike was in progress, further meetings were held. A Conciliator

[15] Respondent is clearly responsible for the efforts of Superintendent McGowan to induce the employees to abandon their concerted activities, notwithstanding the instructions which were given him. As the Supreme Court held in *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, where employees "have just cause to believe" that supervisory officials are "acting for and on behalf of management," the employer may be held accountable for their activities even though the acts in question "were not expressly authorized or might not be attributable to him on strict application of the rules of respondeat superior" (311 U. S., at 80). See also *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514, 520–521; *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584; *National Labor Relations Board* v. *Pacific Gas and Electric Co.*, 118 F. (2d) 780, 787 (C. C. A. 9).

of the United States Department of Labor, Frank Ashe, was present at these meetings. The December 13 meeting began with a consideration of the provision for recognition in the Warehousemen's proposed contract. Powell reiterated his earlier statement that recognition "was not a matter of agreement but was a question of fact which had been decided" (Resp. Exh. 21, R. 749; see also R. 297). Concerning the proposal for a union shop he announced that respondent's policy had not changed in any respect (Resp. Exh. 21, R. 750; R. 176). Thereupon the Unions proposed various modifications of the union-shop provisions, but Powell turned down each proposal (Resp. Exh. 21, R. 750; R. 176). Landye, the attorney for the Unions, then asked whether respondent would submit to arbitration all of the Unions' demands except the demand for a union shop. When Powell answered in the negative, Landye asked whether respondent would be willing to submit the whole matter to arbitration, including the union-shop question. Powell refused to agree to this also (R. 515, 170, 179, cf. R. 310). Landye then inquired whether respondent would accept the contract proposed by the Warehousemen if the union-shop clause were eliminated. Powell stated that respondent had substantial objections to certain other provisions. Thereupon Landye requested Powell to submit counterproposals to the entire contracts submitted by the Unions, stating that since respondent could not agree to the proposals of the Union, it was respondent's duty to set forth what would be acceptable to it (Resp. Exh.

21, R. 751; R. 858). As Landye testified (R. 516–517):

> I stated that I wanted the company to take each section of the unions' contracts, and if they agreed, to write it out that way as a section, and if they disagreed, to delete it, and if they had any additions, to put it on the contract.
>
> Mr. Powell stated that the company was not asking anything from us, and that it was up to us to make proposals that would please the company; and that he said his conception of negotiations was that the company had no affirmative duty to do anything, and that it was up to the union to please the company.

In short, Powell's reply to the Union's request was, to use his own words, that "our proposal or demand at present was that the picket lines be removed and the employees be allowed to return to work," and that "the Company had no other proposal to submit nor did the Company intend to make any other demands on the Union" (Resp. Exh. 21, R. 752; See also R. 171, 265–266, 369).

The next meeting was held on December 14, 1940, at the request of Conciliator Ashe. He opened the meeting by asking Powell if respondent "had anything at all in the way of a proposal to submit which might provide a basis for an agreement." Powell replied that respondent had nothing further to submit other than the statement of its position in regard to each one of the proposals theretofore submitted. Powell was then asked if respondent would be willing to sign an agreement which merely set out its present policies and practices. He replied, so the union rep-

resentatives uniformly testified, "No" (R. 175, 452).[16] The question of wages was passed over after Powell claimed and the union representatives disputed that respondent was paying the wages its competitors were (R. 179–181, 242–243; Resp. Exh. 22, R. 757–758). Conciliator Ashe then suggested that they discuss the Unions' demands, one by one, and asked that a stenographer take down what was said, explaining that he could not remember all that had been said and that "he felt sure the union representatives did not understand just what the Company's position is" (Resp. Exh. 22, R. 758; R. 173). Powell objected to such a procedure and further discussion was postponed until the following Monday, December 16 (*ibid.*).

On this day the various representatives again met. One of the union representatives requested that the Warehousemen's contract be gone over clause by clause (Resp. Exh. 23, R. 760). Once again Powell

[16] According to Powell's testimony, he answered by saying that "the question as to the signing of an agreement was one which had not been reached in our negotiations thus far, and therefore * * * was premature" (R. 856). This, beside being in itself a violation of the Act (*infra*, pp. 25–26), was an obvious evasion of the question which had been asked. Note also Powell's report to Barr on the point (Resp. Exh. 22, R. 757):

"Allen then asked if the Company would be willing to sign an agreement which merely sets out the present policies and practices. *I replied that the question of the form of the agreement—that is, whether it should be verbal or written—is premature at this time.* I suggested that if we could reach an agreement on substantial provisions, then that question should be considered. Allen then stated that if we could reach an agreement, *would we be willing to sign it. I replied that possibly we would, but that I thought a discussion of that question was premature.*" [Emphasis supplied.]

reiterated respondent's objections to the union shop, seniority, and arbitration proposals, and questioned the advisability of proceeding with the discussion unless the Union agreed to withdraw these demands (*ibid.*). When the union representatives stated that there was a possibility that the demand for a union shop would be withdrawn, Powell agreed to discuss the Union's other demands (Resp. Exh. 23, R. 761). In the discussion which followed, the Unions also receded from their original position with respect to seniority, offering to permit "merit and ability" to be considered, as well as seniority, in determining whom to lay off and to rehire (Resp. Exh. 23, R. 770–771). Moreover, the Unions indicated a willingness to abandon their request for an arbitration arrangement (Resp. Exh. 23, R. 764). Nevertheless, Powell adhered inflexibly to the positions he had taken previously with respect to the Unions' proposals (Resp. Exh. 23, R. 761–771) and refused even to agree to those demands which involved the making of no concession to the Unions, such as the recognition and no-discrimination clauses. Repeating his former objections, Powell again refused to agree to the inclusion of the recognition clause in the obligating part of the agreement (Resp. Exh. 23, R. 761–762; Bd. Exh. 12, R. 556). Despite a long discussion Powell refused to agree to the inclusion in the agreement of a clause prohibiting anti-union discrimination. Powell's adamant stand with respect to this clause is disclosed by his own report of the discussion of the matter to Barr, as follows (Resp. Exh. 23, R. 765):

> We objected to Section 1 of Article 8 and a long discussion ensued. Ashe agreed we were bound as a matter of law to observe the policy set out in this Section and stated he saw no reason for us objecting to its inclusion in an agreement unless we merely did not want to give the Union the satisfaction of having it there. He also read to us similar clauses in other agreements and asked us if we would change these other agreements in other industries. We stated it was up to those people as to what they desired to put in their agreements. Then the Union representative and Ashe argued that such a clause should be included because a lot of the Union members did not know of a similar provision in the Wagner Act. Finally the Union agreed to pass to the next clause.

Powell refused the Union's demand for increased wages with the assertion that "they (respondent) were the ones to decide whether the employees should have more money" (R. 373). Powell again rejected the Unions' demand for additional compensation for working supervisors upon the admittedly false ground that they did not employ such persons (R. 252; Resp. Exh. 23, R. 764, *supra,* p. 11), and again refused to agree to the provision for meal periods after 5 hours of continuous work, although Barr had written him of the reasonableness of such a proposal (R. 251; Resp. Exh. 10, R. 630). Once again, and for the last time, the Unions asked respondent for a written counter-proposal; again Powell refused, reiterating as his reason that the company did not feel that it had anything to ask of the Unions (R. 501–502). Thereupon the discussions were broken off and were never resumed.

F. The respects in which respondent refused to bargain collectively in violation of Section 8 (5) and (1) of the Act

The nature of the obligation imposed by Section 8 (5) of the Act is stated by the Board in its decision, as follows (R. 55):

> Collective bargaining, as contemplated by the Act, is a procedure looking toward the making of a collective agreement by the employer with the accredited representatives of its employees concerning wages, hours, and other conditions of employment. The duty to bargain collectively, which the Act imposes upon employers, has as its objective the establishment of such a contractual relationship to the end that employment relations may be stabilized and obstruction to the free flow of commerce thus prevented; and, indeed, the protection to organization of employees afforded by the first four subdivisions of Section 8 of the Act is intended to make possible and to implement the stabilization of working conditions through collective bargaining conducted between employers and the freely designated representatives of their employees as equals. The duty to bargain collectively is not limited to the recognition of the employees' representatives *qua* representatives, or to a meeting and discussion of terms with them. The duty encompasses an obligation to enter into discussion and negotiation with an open and fair mind and with a sincere purpose to find a basis of agreement concerning the issues presented, and to make contractually binding the understanding upon the terms that are reached.

With this statement the Courts have uniformly agreed. See *H. J. Heinz Co.* v. *National Labor Relations Board,*

311 U. S. 514, 524–526; *National Labor Relations Board* v. *Biles-Coleman Lumber Co.,* 98 F. (2d) 18, 22 (C. C. A. 9); *National Labor Relations Board* v. *Sunshine Mining Co.,* 110 F. (2d) 780, 787 (C. C. A. 9), cert. denied 312 U. S. 678; *Globe Cotton Mills* v. *National Labor Relations Board,* 103 F. (2d) 91, 94 (C. C. A. 5); *National Labor Relations Board* v. *Griswold Mfg. Co.,* 106 F. (2d) 713, 723 (C. C. A. 3); *National Labor Relations Board* v. *Highland Park Mfg. Co.,* 110 F. (2d) 632, 637 (C. C. A. 4); *Wilson & Co.* v. *National Labor Relations Board,* 115 F. (2d) 759, 763–764 (C. C. A. 8); *National Labor Relations Board* v. *Pilling,* 119 F. (2d) 32, 37 (C. C. A. 3); *Singer Mfg. Co.* v. *National Labor Relations Board,* 119 F. (2d) 131, 134 (C. C. A. 7), cert. denied 313 U. S. 595; *National Labor Relations Board* v. *Reed & Prince Mfg. Co.,* 118 F. (2d) 874, 885 (C. C. A. 1), cert. denied 313 U. S. 595.

Respondent's persistent refusal to assure the Unions that it would reduce to writing any understandings reached during the course of the negotiations, its refusal to bind itself to recognize the Unions and its refusal to agree to other concededly reasonable proposals, its insistence upon determining unilaterally matters which were the legitimate subjects of collective bargaining, its steadfast refusal to make any affirmative efforts to reach an accord with the Unions, and its efforts to induce the employees individually to abandon the strike and to return to work, fully warranted the Board in its finding that respondent's conduct did not measure up to the standard of good faith required by the Act, as we now demonstrate.

1. *Respondent's refusal to assure the Unions that it would reduce to writing whatever understandings were reached*

Powell's refusal at both the September 19 and November 25 conferences with the Unions to assure them that respondent would embody in a signed agreement any understandings that might be reached (*supra*, pp. 6, 12) was a clear breach of its duty to treat with the Unions in good faith. As the Supreme Court declared in *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514, 526, in support of its holding that one part of the employer's obligations under Section 8 (5) of the Act is to embody whatever understandings are reached in a signed agreement:

> * * * A businessman who entered into negotiations with another for an agreement having numerous provisions, with the reservation that he would not reduce it to writing or sign it, could hardly be thought to have bargained in good faith. This is even more so in the case of an employer who, by his refusal to honor, with his signature, the agreement which he has made with a labor organization, discredits the organization, impairs the bargaining process and tends to frustrate the aim of the statute to secure industrial peace through collective bargaining.

It is immaterial that at the time the Unions sought such assurance no specific terms had yet been agreed upon. As the Circuit Court of Appeals for the Fourth Circuit has held, a refusal to embody in a written contract any agreements which might be reached is "a

pertinent circumstance for consideration on the issue of refusal to bargain as required by the Act, even though no agreements were actually reached." *Hartsell Mills Co.* v. *National Labor Relations Board,* 111 F. (2d) 291, 292; *National Labor Relations Board* v. *Highland Park Mfg. Co.*, 110 F. (2d) 632, 637.

2. *Respondent's refusal to agree to concededly reasonable proposals*

Respondent's refusal at the November 12 and December 13 and 16 conferences to agree to bind itself to recognize the Warehousemen (*supra,* pp. 9, 18, 21) further evidences lack of good faith on respondent's part. Respondent's obligation to recognize the Warehousemen is conceded. Recognition, because of its vital importance to the bargaining process, is one of the most frequent subjects of agreement between labor organizations and employers. Respondent's insistence that recognition was not a proper subject of agreement, and that if it should be covered at all in an agreement it should be treated in a preliminary "whereas" clause, can be explained only by a determination to withhold from the Union the full measure of recognition to which it was entitled. By this conduct respondent violated the Act. *McQuay-Norris Mfg. Co.* v. *National Labor Relations Board,* 116 F. (2d) 748, 750–751 (C. C. A. 7), cert. denied 313 U. S. 565. As in *H. J. Heinz Co.* v. *National Labor Relations Board,* 110 F. (2d) 843, 849 (C. C. A. 6), aff'd 311 U. S. 514, respondent's conduct in this respect "may well have left the employees suspicious of its good faith and with a sense of insecurity that does not exist ordinarily when neither

party has reasonable ground to doubt the other's good faith."

Respondent's refusal to agree to a clause requiring it to refrain from antiunion discrimination is likewise demonstrative of a lack of good faith on respondent's part. Its objection that such a matter was "covered by law and is not a subject of agreement" is plainly specious. Such provisions are frequently sought by labor organizations and granted by employers to give employees a feeling of security in the exercise of the rights guaranteed in the Act. The fact that antiunion discrimination is prohibited by law is certainly no reason to deny to employees this additional protection, if they think it necessary or desirable. The employees' experience when they first attempted to organize and exercise their rights under the Act in December 1936 gave them ample reason to believe that the law alone was not complete protection against discrimination at respondent's hands.[17] As with the refusal to agree to sign a written contract and to recognize the Unions, we think the only explanation for respondent's refusal to agree to include this clause in the contract is, as Conciliator Ashe observed, that it "did not want to give the Union the satisfaction of having it there" (Resp. Exh. 23, R. 765). The Board, therefore, was clearly

[17] In the earlier decision involving respondent's Portland mail order house and retail store here involved, which was sustained with minor modifications by the Circuit Court of Appeals for the Seventh Circuit (see note 6, p. 6, *supra*), the Board found that respondent had interfered with self-organization among its employees at the Portland mail order house and store by uttering antiunion statements, employing detectives to investigate union activities, and discharging 23 employees because of their union membership and activities.

justified in finding, as it did (R. 62), that respondent's refusal to agree to the clause prohibiting discrimination constituted a further demonstration of respondent's lack of good faith in dealing with the Unions. Directly in point is *Singer Manufacturing Co.* v. *National Labor Relations Board,* 119 F. (2d) 131 (C. C. A. 7), cert. denied 313 U. S. 595. In that case, Board findings that the employer's rejection of a clause prohibiting anti-union discrimination upon the ground that such "was its legal duty irrespective of contract" was indicative of a want of good faith were expressly sustained by the Court (119 F. (2d), at 138–139). Cf. *National Labor Relations Board* v. *Highland Park Mfg. Co.,* 110 F. (2d) 632, 635, 637 (C. C. A. 4); *National Labor Relations Board* v. *Boss Mfg. Co.,* 118 F. (2d) 187, 188–189 (C. C. A. 7).

Powell's rejection of the Unions' demand for additional compensation for working supervisors upon the admittedly false ground that respondent did not employ persons in such a capacity (*supra,* pp. 11–12), also warranted the inference that respondent was not treating with the Unions with the sincerity required by the Act. Moreover, Powell's insistence that employees be required to work 6 hours without a meal period rather than 5 hours as sought by the Unions, although Powell's superior, Barr, had advised him that "under normal conditions an employee should not be worked more than five consecutive hours without a meal period," demonstrates its unwillingness to agree to any proposal, no matter how reasonable. As the Court said in *National Labor Relations Board* v. *Wil-*

son & Co., 115 F. (2d) 759, 763 (C. C. A. 8), "a refusal to do what reasonable and fair-minded men are ordinarily willing to do, upon request, may certainly be taken to be an indication of a lack of proper intent and good faith in collective bargaining."

3. *Respondent's insistence upon determining unilaterally matters which were the legitimate subjects of collective bargaining*

Throughout the negotiations respondent took the position that the Unions' proposals, including their demands for a union shop, a seniority rule, and an arbitration clause, were objectionable because they conflicted with "company policy," which in respondent's view was a fixed and inflexible matter and not to be bargained about. Thus, Powell asserted with respect to the Unions' principal demands that "in order to operate * * * the mail order business and the retail store business successfully * * * the ultimate decision * * * should remain in the management" (*supra*, pp. 9–10, see also note 10, p. 10, *supra*). And in connection with the Unions' request for increased wages Powell asserted at the December 16 conference that it was for respondent "to decide whether the employees should have more money" (*supra,* p. 22). The Board very properly regarded respondent's repeated rejection of union proposals on the general ground that they were not consonant with company policy or practice as "illustrative of the respondent's bad faith in the negotiations" (R. 65–66). Respondent was in effect "reserving the right to act unilat-

erally and of its own will alone upon matters involving legitimate collective bargaining," in clear violation of its duty to bargain collectively. *Singer Mfg. Co.* v. *National Labor Relations Board,* 119 F. (2d) 131, 136 (C. C. A. 7), cert. denied 313 U. S. 595. Other Courts have condemned as violative of the Act similar attempts to exclude from the area of permissible bargaining certain legitimate subjects of collective bargaining. *National Licorice Co.* v. *National Labor Relations Board,* 309 U. S. 350, 360; *National Labor Relations Board* v. *Reed & Prince Mfg. Co.,* 118 F. (2d) 874, 883 (C. C. A. 1), cert. denied 313 U. S. 595; *National Labor Relations Board* v. *Westinghouse Air-brake Company,* 120 F. (2d) 1004, 1006–1007 (C. C. A. 3); see also *Rapid Roller Co.* v. *National Labor Relations Board,* 126 F. (2d) 452, 459 (C. C. A. 7).

4. *Respondent's steadfast refusal to make any affirmative efforts to reach an accord with the Unions*

Respondent's persistent refusal to take any initiative in the negotiations to the end that an agreement might be reached clearly warranted the conclusion of the Board (R. 63) that respondent "by its negative attitude was refusing to bargain collectively in good faith." Throughout the negotiations respondent steadfastly refused to submit to the Unions either a contract which was acceptable to it or counterproposals to the various demands of the Unions, although repeatedly requested to do so (*supra,* pp. 7–8, 11–12, 18–19, 22). Even after the Unions had receded from their principal demands and asked respondent "to take each section of the

union's contracts, and if they agreed, to write it out that way as a section, and if they disagreed, to delete it, and if they had any additions, to put it on the contract" (*supra,* pp. 18–19), respondent refused to do so. Nor would respondent even agree to enter into an agreement providing simply for the continuation of the existing terms and conditions of employment (*supra,* pp. 19–20). What is more, respondent openly proclaimed throughout the negotiations that it was under no obligation to submit counterproposals, that respondent "was not asking anything from" the Unions and that it was up to the Unions "to make proposals that would please" respondent, and that respondent "had no affirmative duty to do anything" (*supra,* pp. 7–8, 11, 19–20).

This do-nothing philosophy of collective bargaining plainly cannot be reconciled with the requirements of the Act. The objective of the collective bargaining process, as the Courts have repeatedly held, is "an agreement between employer and employees as to wages, hours, and working conditions." *H. J. Heinz Co.* v. *National Labor Relations Board,* 311 U. S. 514, 523. This objective cannot be achieved if the employer merely sits back and says yes or no to the employees' proposals. It will indeed be a rare case in which a union, casting about in the dark without help or guidance from the employer, happens to hit upon a set of proposals which prove satisfactory to the employer. The process of collective bargaining cannot be made to turn on such rare and far-fetched accidents. As the Board pointed out in its decision, "It takes the affirmative efforts of the two parties, * * * to

make a collective bargain" (R. 63). The Circuit Courts of Appeals have thus uniformly held that where, as here, the employer refuses to submit counterproposals when requested to do so, his refusal may be taken by the Board as evidence of bad faith and an unwillingness to engage in genuine bargaining. "When a counter-proposal is directly asked for, it ought to be made." *Globe Cotton Mills* v. *National Labor Relations Board,* 103 F. (2d) 91, 94 (C. C. A. 5). A refusal to submit counterproposals "may go to support a want of good faith and, hence, a refusal to bargain." *National Labor Relations Board* v. *Pilling,* 119 F. (2d) 32, 37 (C. C. A. 3). Accord: *National Labor Relations Board* v. *Boss Mfg. Co.,* 118 F. (2d) 187, 189 (C. C. A. 7). The sense of this requirement is apparent. Collective bargaining is a two-way, not a one-way, proposition. It requires a "sincere purpose" on the part of both parties to arrive at a mutually satisfactory agreement (see authorities cited on pp. 23–24, *supra*). This presupposes *bona fide* active efforts on both sides, not one, to discover the terms upon which there will be accord. This was admittedly absent here; it is unquestioned that Barr gave express, written orders to his negotiator, Powell, not to "rush" the bargaining process, or "take the initiative," or "agree" to matters even though there was no dispute as to them, or "volunteer" proposals or counterproposals, or state respondent's position "in writing" (*supra,* p. 8, note 7); the philosophy behind these sabotaging orders was also explicitly declared, to wit, that the "union is seeking" an agreement—respondent

was not! In short, it is abundantly clear that respondent was seeking by the appearance of negotiations, but with no sincere purpose to achieve an agreement, to keep within the letter, while defeating the purpose of the Act. "The studied and meticulous efforts of the respondent, in the course of its negotiations with its employees * * * to be 'within the law', tell their own story. Duties imposed by law cannot be discharged by offering shadow for the substance." *National Labor Relations Board* v. *Griswold Mfg. Co.*, 106 F. (2d) 713, 723 (C. C. A. 3). Respondent's violation of the Act is manifest.

Further, in refusing to embody the existing terms and conditions of employment in a binding agreement when the Unions asked whether it would do so (*supra*, pp. 19–20) respondent undeniably established its lack of good faith. If the employer finds himself unpersuaded by the arguments advanced in support of the employees' demands, the very least he must do, when request is made, is to offer to enter into an agreement providing for the maintenance of the *status quo*. *National Labor Relations Board* v. *Express Publishing Co.*, 111 F. (2d) 588, 589 (C. C. A. 5); *Ritzwoller Co.* v. *National Labor Relations Board*, 114 F. (2d) 432, 436 (C. C. A. 7). Respondent was not even willing to do this.

5. *Respondent's efforts to induce the employees individually to abandon the strike and to return to work*

Although respondent had accepted the Unions as the representatives of its employees and knew that the

Unions were taking concerted action against it, as was their unquestioned right under the Act, respondent by means of threats and solicitation sought to induce the striking employees individually to return to work (*supra,* pp. 15–17), thereby violating, as the Board found (R. 67), "its obligation to deal with the Unions as the exclusive representatives of the employees." That this effort to "undercut" the authority of the Unions to act as the exclusive bargaining agents of the employees "reflects on its good faith in the collective bargaining negotiations," as found by the Board (R. 67), is not open to question. See *National Labor Relations Board* v. *Biles-Coleman Lumber Co.,* 98 F. (2d) 18, 21 (C. C. A. 9); *National Labor Relations Board* v. *Remington Rand, Inc.,* 94 F. (2d) 862, 870 (C. C. A. 2), cert. denied 304 U. S. 576; *National Labor Relations Board* v. *Reed & Prince Mfg. Co.,* 118 F. (2d) 874, 883–885 (C. C. A. 1), cert. denied 313 U. S. 595; *Ritzwoller Co.* v. *National Labor Relations Board,* 114 F. (2d) 432, 436 (C. C. A. 7).

In view of respondent's persistent refusal to assure the Unions that it would "honor with its signature" any agreement reached with them; its stubborn resistance against agreeing to do merely what the law requires it to do, i. e., to recognize the Unions and to refrain from discrimination against their members; its failure to agree to concededly reasonable proposals, or even to agree to a contract providing for the continuation of existing terms and conditions of employment; its insistence upon determining unilaterally matters

which are legitimate subjects of collection bargaining; its obdurate refusal to submit written counterproposals, its insistence that it was not required to make an affirmative effort to reach an accord with the Unions, and its view that the Unions must continue to submit proposals until they found one that would "please" respondent; the dilatory tactics adopted in connection with the Unions' request for a conference with policy-making officials of respondent in Chicago; and its effort to "undercut" the authority of the duly chosen bargaining representatives of the employees by going to the employees themselves with a request that they return to work—on all these bases the Board very properly found (R. 68) that respondent "did not, as it was bound to do 'confer and negotiate sincerely with the representatives of its employees * * * with an open mind and sincere desire to reach an agreement in a spirit of amity and cooperation.'" Indeed, the Board's conclusion (R. 68) is inescapable that respondent "while going through the motions of meeting and conferring with the Unions," had no intention of reaching an agreement with the Unions, regardless of terms; respondent was engaging in "mere shadow-boxing." See *Stonewall Cotton Mills* v. *National Labor Relations Board,* decided June 3, 1942, 10 L. R. R. 514 (C. C. A. 5). The Board was amply justified in finding, on this evidence, that respondent had violated Section 8 (5) and (1) of the Act.

In view of the whole course of the negotiations the Board properly concluded that the strike, called as it was shortly after the union representatives expressed the view that they "were being stalled" and at a time

when their request for a further meeting had been ignored for several days, was caused and thereafter prolonged by respondent's refusal to bargain collectively in good faith with the Unions (R. 68). This conclusion is buttressed by the Unions' efforts after the strike began to find a basis for an agreement with respondent. Receding from their principal demands, that is, for a union shop, a seniority rule, and an arbitration clause (see p. 21, *supra*), the Unions asked respondent literally to write its own contracts with them, but to no avail. In this situation it is idle to urge, as did respondent before the Board, that the Unions were striking solely to enforce their demand for a union shop. Indeed, on all the facts, it is difficult to see how the Board could have reached any other conclusion than it did (R. 68), namely, that "a substantial cause of the strike and its prolongation was the justified feeling of the Unions that the respondent was 'stalling'; that is, not fulfilling its obligation to bargain collectively as required by the Act."

Disregarding the unanimous array of authorities against it, respondent contends that good faith is not an element of the duty to bargain collectively.[18]

This contention is completely foreclosed by the authorities under the Act (see pp. 23–24, *supra*) and by the authorities under the analogous Railway Labor Act

[18] Thus respondent asserted in its brief before the Board, a copy of which has been filed herein for the convenience of the Court, that:

"* * * The Congress further assumed that, by placing upon employers the simple requirement of meeting with the representa-

as well. In *Singer Mfg. Co.* v. *National Labor Relations Board,* 119 F. (2d) 131 (C. C. A. 7), the employer vigorously urged precisely this contention both in its main brief and in its reply brief. The Court squarely rejected the contention, holding:

> * * * We think the Board had full authority to determine as a fact whether petitioner was acting in good faith or whether its actions amounted to a mere superficial pretense at bargaining—whether it had actually the intent to bargain, sincerely and earnestly—whether the negotiations were captious and accompanied by an active purpose and intent to defeat or wilfully obstruct real bargaining (119 F. (2d), at p. 134).

The employer in the *Singer* case raised this same contention and stressed its importance in the administration of the Act in its petition to the Supreme Court for

tives of their organized employees, the attainment of industrial peace through agreements would be furthered. As one court has said:

"'The Act * * * meant to give to the employees whatever advantage they would get from collective pressure upon their employer; and the question here is what are the fair implications of that grant.'

"*Art. Metals Constr. Co.* v. *N. L. R. B.* (1940, C. C. A., 2d cir.), 110 F. (2d) 148, at p. 150.

"The 'implications of the grant' do not in any way include the imposition of a greater duty upon the employer than to participate in the *procedure* established by law. To imply that the Congress undertook the superhuman task of legislating a state of mind for all employers, or that the Congress intended to set up indefinite and imponderable standards of conduct described by such words as 'sincerity' and 'good faith,' is to go far beyond the reasonable 'implications of the grant,' and to convert an intelligible and easily-administered law into an instrument of potential and terrifying abuse" (Resp. brief before the Board, pp. 19–20).

a writ of certiorari; nevertheless, the petition was denied by the Court (313 U. S. 595). The company's petition for a rehearing again raising this issue was also denied by the Supreme Court (62 S. Ct. 55). The Supreme Court rejected an identical contention in a case arising under the Railway Labor Act. In *Virginian Railway Co.* v. *System Federation No. 40,* 300 U. S. 515, the Court reviewed a decree requiring the railroad company to "treat with" the agent of its employees and to "exert every reasonable effort to make and maintain agreements." The company insisted that its obligation to bargain was not a fit subject for a decree in equity because negotiation depends upon desires and mental attitudes which are far beyond judicial control. The court summarily disposed of this contention, saying (at p. 550): "Whether an obligation has been discharged, and whether action taken or omitted is in good faith or reasonable, are everyday subjects of inquiry by courts in framing and enforcing their decrees."

With respondent erroneously taking the position that Section 8 (5) of the Act places upon employers only "the simple requirement of meeting with the representatives of their organized employees" (*supra,* p. 36, note 18), and that the Board may not inquire into an employer's sincerity and good faith in the negotiations, it is readily understandable why respondent's conduct throughout the negotiations did not measure up to the standard of good faith which the Courts have universally held to be required by the Act.

G. Respondent's interference, restraint, and coercion in violation of Section 8 (1) of the Act

It is not open to doubt, particularly inasmuch as the strike was caused by respondent's unfair labor practices, that, as the Board found (R. 74), "respondent, by communicating with the employees directly through its supervisory employees, and by stating to the employees that 'we are operating tomorrow as usual and your job is open for you if you want to come in,' was seeking to induce the striking employees to desert the Unions and to abandon their concerted activity." By such solicitation and by McGowan's threatening statements to his subordinates (*supra,* pp. 15–17), respondent plainly interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act. See the authorities cited on p. 24, *supra,* and *National Labor Relations Board* v. *Biles-Coleman Lumber Co.,* 98 F. (2d) 18, 22–23 (C. C. A. 9).

Point II

The Board's order is valid and proper under the Act

The provisions of the order requiring respondent to cease and desist from the specific unfair labor practices found (paragraphs 1 (a), (b); R. 80–81) are of settled validity. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.,* 303 U. S. 261, 265. Equally valid under the circumstances of this case are the provisions of the order requiring respondent to cease and desist from in any other manner interfering with its employees in the exercise of their right to self-organization and collective bargaining (para-

graph 1 (c); R. 81). Respondent not only refused to bargain collectively in good faith with the Unions in violation of Section 8 (5) and 8 (1) of the Act, but also, in further and independent violation of Section 8 (1) sought to induce the striking employees to desert the Unions and abandon their concerted activities, and used threats of discharge as well as of a plant shut-down. In this situation, where separate and independent violations of Section 8 (1) are found, the doctrine of *National Labor Relations Board* v. *Express Publishing Co.,* 312 U. S. 426, has no application, and the Board properly entered the general cease and desist order. *National Labor Relations Board* v. *Hollywood-Maxwell Co.,* 126 F. (2d) 815, 819 (C. C. A. 9); *National Labor Relations Board* v. *Pacific Gas and Electric Co.,* 118 F. (2d) 780, 789 (C. C. A. 9); cf. *National Labor Relations Board* v. *National Motor Bearing Co.,* 105 F. (2d) 652, 660 (C. C. A. 9).

The provisions of the order requiring that respondent offer reinstatement with back pay to those employees who went on strike on December 7, 1940, or thereafter and who have applied for and been denied reinstatement; and that respondent, upon application, offer reinstatement to those strikers who have not heretofore applied for reinstatement, with back pay from any denial of their applications (paragraphs 2 (a), (b), (c), and (d); R. 82–83) are the normal remedial provisions entered in cases where strikes are caused or prolonged by unfair labor practices. Their propriety has been uniformly sustained by the Courts. *National Labor Relations Board* v. *Grower-Shipper Vegetable Association,* 122 F. (2d) 368, 378 (C. C. A.

9); *National Labor Relations Board* v. *Carlisle Lumber Co.,* 94 F. (2d) 138 (C. C. A. 9), cert. denied 304 U. S. 575; *National Labor Relations Board* v. *Biles-Coleman Lumber Co.,* 98 F. (2d) 18 (C. C. A. 9); *Republic Steel Corp.* v. *National Labor Relations Board,* 107 F. (2d) 472, 478 (C. C. A. 3), cert. denied on this point 309 U. S. 684.

The validity of the provision directing respondent to bargain collectively with the Unions (paragraph 2 (f); R. 84) is not open to question. *National Labor Relations Board* v. *P. Lorillard Co.,* 314 U. S. 512; *National Labor Relations Board* v. *Bradford Dyeing Association,* 310 U. S. 318, 339–340.

CONCLUSION

It is respectfully submitted that the National Labor Relations Act has been validly applied to respondent, that the Board's findings are supported by substantial evidence, that its order is valid and proper in all respects, and that a decree should issue affirming and enforcing said order in full, as prayed in the Board's petition and request for enforcement.

ROBERT B. WATTS,
General Counsel,
ERNEST A. GROSS,
Associate General Counsel,
GERHARD P. VAN ARKEL,
Assistant General Counsel,
MORRIS P. GLUSHIEN,
OWSLEY VOSE,
JOHN H. GARVER,
Attorneys,
National Labor Relations Board.

JULY 1942.

APPENDIX

The relevant provisions of the National Labor Relations Act, 49 Stat. 449, 29 U. S. C., sec. 151 *et seq.*, are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.
>
> SEC. 8. It shall be an unfair labor practice for an employer—
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.
>
> * * * * *
>
> (5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).
>
> * * * * *
>
> SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

U. S. GOVERNMENT PRINTING OFFICE: 1942